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No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

McCREARY COUNTY, KENTUCKY, et. al.,
Petitioners.

v.

ACLU OF KENTUCKY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether (a) passage of nearly ten years, (b) a change in governmental decision-makers, (c) official renunciation of prior actions and (d) a display and resolutions setting forth legitimate secular purposes are constitutionally significant facts sufficient to erase a so-called taint of religious purpose found in prior displays on a courthouse wall containing the Ten Commandments so as to permit the display of eleven equally sized framed historical documents, one of which is the Ten Commandments, and if not, then what would constitute constitutionally significant facts sufficient to purge a prior taint and permit the display.

2. Whether the Establishment Clause is violated by a privately donated display on government property that includes eleven equally sized frames containing an explanation of the display along with nine historical documents and symbols that played a role in the development of American law and government where only one of the framed documents is the Ten Commandments and the remaining documents and symbols are secular.

3. Whether the *Lemon* test should be overruled since the test is unworkable and has

fostered excessive confusion in Establishment Clause jurisprudence.

4. Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical and otherwise passive expressions or displays of religion.

PARTIES

Petitioners are McCreary County, Kentucky, and its County Judge Executive, Blaine Phillips, and Pulaski County, Kentucky, and its County Judge Executive, Barty Bullock (collectively, "the Counties").

Respondents are the American Civil Liberties Union of Kentucky, Louanne Walker and Dave Howe as residents of McCreary County, and Lawrence Durham and Paul Lee as citizens of Pulaski County (collectively, "Respondents").

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OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals (App., 1a-33a) is reported at 607 F.3d 439. The opinion of the Court of Appeals denying rehearing and rehearing en banc is not reported, but is reprinted at App., 34a-35a. The opinion of the District Court granting the Motion to Amend or Alter Judgment and granting a permanent injunction is unreported, but is reprinted at App.,36a-53a. The opinion of the District Court denying summary judgment is reprinted at App., 54a-72a.

JURISDICTION

The judgment of the Court of Appeals was filed on June 9, 2010. The Court of Appeals denied rehearing en banc on July 29, 2010. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises issues involving the Establishment Clause of the First Amendment to the United States Constitution, as applied to the states under Section 1 of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The Sixth Circuit has added another strand to the tangled web of Establishment Clause analysis. The panel acknowledged but then immediately disregarded this Court's statement that the religious purpose found in the Counties' prior displays containing the Ten Commandments would not forever "taint" future displays. *ACLU v. McCreary County*, 607 F.3d 439, 449 (6th Cir. 2010) (citing *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 873-874 (2005)). The Sixth Circuit held that *McCreary County* established that the contents, not just the "tainted" history of the Counties' initial Foundations of American Law and Government Displays ("Foundations Displays"), violated the Establishment Clause. *Id.* Acknowledging that its decision created an intra-circuit conflict with other Sixth Circuit panels which found identical Foundations Displays constitutional,[1] the *McCreary County* Sixth Circuit panel chided its colleagues for allegedly not following this Court's "definitive conclusion" that the contents of the Foundations Display are unconstitutional. *Id.* at 449.

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[1] *ACLU of Ky. v. Grayson County*, 591 F.3d 837 (6th Cir. 2010); *ACLU of Ky v. Mercer County*, 432 F.3d 624 (6th Cir. 2005).

In fact, it is the *McCreary County* Sixth Circuit panel, not the panels in *Mercer County* and *Grayson County*, which has contravened this Court's direction that its 2005 decision in *McCreary County* should be read narrowly so as to not categorically preclude the integration of the Ten Commandments into a governmental display on law or American history. *McCreary County*, 545 U.S. at 873-874. The conflict between the Sixth Circuit's ruling in this case, this Court's 2005 *McCreary County* ruling, and the rulings by the same Sixth Circuit in *Mercer County* and *Grayson County* is indicative of the ongoing, pervasive confusion in Establishment Clause analysis of passive religious displays. Five years ago, shortly after this Court's decision in *McCreary County*, the *Mercer County* panel called Establishment Clause jurisprudence "purgatory." *Mercer County*, 432 F.3d at 636.[2] The Sixth Circuit's decision here

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[2] The Sixth Circuit's comment is illustrative of the criticisms leveled against this Court's Establishment Clause jurisprudence in general and the *Lemon* test in particular and points to the need to review and replace *Lemon*. *See e.g., Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring) (Establishment Clause cases are "in hopeless disarray"); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (noting

demonstrates that the problem has only gotten worse since this Court's 2005 decisions in *McCreary County* and *Van Orden v. Perry*, 545 U.S. 677 (2005).

Without stating why Petitioners' measures were insufficient or what measures would be sufficient, both the District Court and Sixth Circuit merely concluded that the actions taken by the Counties since 2005 were not enough to "purge the taint" of religious purpose from a decade ago. (App., 21a-22a). The first of those displays were stand-alone framed copies of the Decalogue placed on walls in the courthouses in McCreary and Pulaski counties in 1999. (App., 2a). About one month after Respondents initially filed suit in 1999, Petitioners enacted resolutions authorizing expanded displays that included eight other documents in smaller frames with a copy of the Ten Commandments. (App., 3a). After the District Court issued a preliminary injunction

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the "sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon*"); Adam M. Conrad, *Note, Hanging The Ten Commandments On The Wall Separating Church And State: Toward A New Establishment Clause Jurisprudence*, 38 GA. L. REV. 1329, 1356 (2004) ("In thirty years the [*Lemon*] test has earned nothing but ridicule from both academia and the bench.").

against the first and second displays, the counties installed the Foundations Display. (App., 5a). The Display includes eleven equally sized framed documents, including the Ten Commandments, Magna Carta (in two frames), Declaration of Independence, National Motto, Mayflower Compact, Preamble to the Kentucky Constitution, the Bill of Rights, lyrics to the national anthem, a picture of Lady Justice, and an explanatory document. (App., 5a). The District Court issued a supplemental preliminary injunction against the Foundations Display, finding that the "clear purpose" of the Display, in light of the prior two displays, was religious. (App., 6a). A divided Sixth Circuit upheld the decision. *ACLU of Ky. v. McCreary County*, 354 F.3d 438 (2003).

This Court, in a 5-4 decision, affirmed the preliminary injunction, remanded the case, and cautioned that its ruling should not be read as saying that Petitioners' past actions forever taint future actions. *McCreary County*, 545 U.S. at 873-874. In March 2005, after this Court heard oral argument but before its decision, Petitioners enacted resolutions that repealed and repudiated the December 1999 resolutions approving the second displays. (App., 8a). In a footnote, this Court acknowledged the resolutions, but said that they were of minimal significance in light of the

evolution of the evidence to that point. *Id.* at 872 n.19.

Cross-motions for summary judgment were filed after discovery, but the District Court denied both parties' motions for summary judgment, (App., 72a), stating:

> Since it is possible to purge the taint of the impermissible religious purpose, it necessarily follows that the injury from the constitutional violation is not "continuing" as required by the standard for a permanent injunction. Therefore, the court will deny the plaintiffs' motion for summary judgment, which seeks to permanently enjoin the third displays, because they are not entitled to a permanent injunction as a matter of law.

(App., 67a). The court found that the Counties had not "purged the taint" of the first two displays and therefore were not entitled to judgment as a matter of law, (App., 69a), but the court also found that the Plaintiffs were similarly not entitled to summary judgment. The Plaintiffs/Respondents filed a Motion to Alter or Amend the order, asking the Court to, *inter alia*, reverse itself and enter a permanent

injunction invalidating the Foundations Displays. (App., 42a).

The composition of the governing bodies of both Counties had significantly changed since 1999, and even since 2005, and both Counties passed new resolutions in 2007, again repudiating the first two displays and declaring a clear secular and educational purpose for the Foundations Displays. (App., 42a). The Counties submitted the new resolutions to the District Court as part of a renewed Motion for Summary Judgment and response to Respondents' Motion to Alter or Amend the Judgment. (App., 42a). The District Court granted the Respondents' motion (App., 51a), and issued a permanent injunction against the Foundations Displays (including the prior two displays even though the Counties had repudiated them years ago), declaring all of the displays unconstitutional. (App., 51a-52a)).

The Counties appealed pursuant to 28 U.S.C. §1292(a)(1) and the Sixth Circuit by a divided vote affirmed. *ACLU v. McCreary County*, 607 F.3d at 448-449. The same majority panel (which was the same majority that ruled in the 2003 Sixth Circuit *McCreary County* case) found that the passage of time, change in county personnel, and the adoption of new resolutions renouncing the prior acts were

not sufficient to purge the "religious taint" of the prior displays. *Id.* at 448.

> [T]he fact that more time has passed since the Supreme Court decision is meaningless in this case, because Defendants have spent the time since the Supreme Court decision continuously seeking to accomplish their initial purpose of posting the Ten Commandments as a religious document. Unlike a case in which the passage of time might have some significance, there has been no dormant period here; Defendants have continuously sought to defend their actions and accomplish what they initially set out to do. Third, the change in government personnel is irrelevant, because the "objective observer" test does not encompass "judicial psychoanalysis of a drafter's heart of hearts." *Id.* [*McCreary County*, 545 U.S.] at 862, 125 S.Ct. 2722. Finally, the two sets of "new" government resolutions are not new: the 2005 resolutions were enacted before the Supreme Court's decision and deemed of minimal significance by the Court, and the 2007 resolutions were passed more

> than a year after the close of discovery in response to the district court's finding that the posting of the Foundations Displays continued to violate the Establishment Clause.

Id. The panel held that the 2007 resolutions, "like the previous statements of purpose, were adopted only as a litigating position." *Id.* "Thus, like the 2005 resolutions, the 2007 resolutions provide little evidence that Defendant's actual purpose has changed and are of minimal significance in light of the evolution of the evidence." *Id.* (citing *McCreary County*, 545 U.S. at 872 n. 19).

The majority panel attempted to distinguish the conflicting rulings in *Mercer County* and *Grayson County* by asserting that this Court "has definitively found that the display at issue violates the Establishment Clause, and we are obligated to follow that precedent if no constitutionally significant facts have changed." *McCreary County*, 607 F.3d at at 449. In fact, this Court's 2005 decision in *McCreary County* only ruled on the purpose prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) at the preliminary injunction stage, and never addressed the effects prong of *Lemon*.

Judge Ryan dissented and wrote:

> The only real difference [between this case and the prior *McCreary County* case] is that this appeal presents the question whether the defendants have "purged" the "Foundations of Law and Government Displays" of the religious "taint" of the Ten Commandments. My colleagues think they have not. I think they could not because there was no "taint" to be "purged," and even if there were, the defendants' effort to do so has been disqualified as a mere "litigating position."...
>
> My colleagues have deftly foreclosed consideration of the issue whether the counties' 2007 resolutions expressly disclaiming any intention to endorse religion may have "purged the taint" of religion from the third set of displays with the dismissive observation that the 2007 resolutions were "adopted only as a litigating position." With that nearly Clausewitz-perfect blocking action, I am left with nothing to add to what I wrote in *McCreary III* [354 F.3d 438 (2003)], except the

following:

1. I humbly associate myself with Justice Scalia's powerful and logically compelling explanation in *McCreary IV* [545 U.S. 844 (2005)] that the displays in question do not violate the First Amendment and never did.

2. I cannot be too critical of my panel colleagues who feel stare decisis bound by the Supreme Court majority's persistent hostility to religion and its refusal to acknowledge the historical evidence that religion, religious symbols, and the support of religious devotion were of the very essence of the values the Constitution's authors and the ratifying legislators thought they were preserving in the language of the First Amendment.

The result, I fear, is that federal courts will continue to close the Public Square to the display of religious symbols as fundamental as the Ten Commandments, at least until the Supreme Court rediscovers the history and

> meaning of the words of the religion clauses of the First Amendment and jettisons the flawed reasoning of *Lemon*....

(App., 31-33a).

The Sixth Circuit's misinterpretation of this Court's prior ruling and the acknowledged intra-circuit conflict regarding identical displays is symptomatic of the much larger problem of unarticulated standards for and inconsistent rulings on Establishment Clause challenges to passive religious displays. The confusion resulting from the lack of a coherent Establishment Clause standard will only continue to grow until this Court steps in to provide the objective standards legislators need to avoid falling into Establishment Clause traps. This Petition provides this Court with the opportunity to finally tear down the walls of the labyrinth of Establishment Clause jurisprudence.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S FINDING THAT THE FOUNDATIONS DISPLAYS REMAIN "TAINTED" BY AN IMPERMISSIBLE RELIGIOUS PURPOSE FROM A DECADE AGO CONFLICTS WITH THIS COURT'S DECISION IN MCCREARY COUNTY AND PRECEDENTS REGARDING LEMON'S PURPOSE PRONG.

In *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005) this Court determined that the Counties' first two displays containing the Ten Commandments evinced an impermissible religious purpose, but that it was not a permanent "taint" to future displays. *Id.* at 873-874. This Court eschewed a "once tainted always tainted" approach and stated that integrated historical displays which include the Ten Commandments can withstand Establishment Clause challenges. *Id.* at 874. Contrary to that determination, the Sixth Circuit held that this Court definitively determined that the contents and history of the Foundations Display are impermissible so that the passage of time, change in government

leadership and explicit renunciation of prior governmental actions cannot erase the "taint" from a decade ago. *ACLU v. McCreary County*, 607 F.3d 439, 449 (6th Cir. 2010).

The Sixth Circuit not only misinterpreted this Court's holding in *McCreary County* but also failed to engage in the analysis required to determine whether the government's stated purpose is plausible or a sham. As this Court said in *McCreary County*, government statements of purpose are generally given deference so that a finding of impermissible religious purpose has been rare. *McCreary County*, 545 U.S. at 863. The Sixth Circuit's finding of impermissible religious purpose conflicts with that precedent and further muddies the already murky waters of Establishment Clause analysis.

A. The Sixth Circuit's Opinion Conflicts With This Court's Conclusion That Past Actions Do Not Forever "Taint" Public Displays Of Historical Expressions Of Religion.

The Sixth Circuit panel acknowledged this Court's holding that the Foundations Displays should not be branded as perpetually impermissible, but then disregarded it when it ruled that the displays still evince a religious

purpose. The panel departed significantly from this Court's reasoning in *McCreary County* and even implied that the Court did not mean what it said when it found that the Foundations Displays were not forever "tainted."

In *McCreary County*, this Court disavowed the notion that government can never evince a secular purpose for displays that include the Ten Commandments, just as it had in *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam). *McCreary County*, 545 U.S. at 868. While the majority questioned why certain documents were included in the Foundations Displays, it did not, as the Sixth Circuit intimates, rule that the contents of the Foundations Displays were *per se* unconstitutional. *Id.* at 872-873. Indeed, this Court never addressed *Lemon*'s effect prong. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Instead, as in *Stone*, the *McCreary County* Court distinguished the posting of the text of the Ten Commandments in isolation from integrated displays that included the Commandments or other parts of the Bible. *McCreary County*, 545 U.S.. at 868-869 (citing *Stone*, 449 U.S. at 42: "This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like"). In *McCreary*

County and *Stone*, this Court found a constitutionally significant difference between posting a solitary copy of the Ten Commandments and posting a copy of the Ten Commandments amid other historical documents.

Similarly, this Court found a constitutionally significant difference between requiring that Creationism be taught in public schools and permitting Creationism to be taught as one of numerous theories on the origins of life in *Edwards v. Aguillard*, 482 U.S. 578, 593-594 (1987). "We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught." *Id.* at 593. "[T]eaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction." *Id.* at 594. "But because the primary purpose of the Creationism Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause." *Id.*

Implicit in each of these opinions, including *McCreary County*, is the principle that public displays of religious expression are not to be labeled "once tainted always tainted," as the Sixth Circuit has effectively done here. *See also, ACLU v. Schundler*, 168 F.3d 92, 105

(3d Cir. 1999) (opinion by Justice, then Judge, Alito rejecting the notion that an impermissible purpose in one holiday display means subsequent displays are forever "tainted").

Notably, the Sixth Circuit previously recognized that declaring a stand-alone Ten Commandments monument unconstitutional does not mean that the government is forever barred from displaying the Decalogue. *Adland v. Russ,* 307 F.3d 471, 489 (6th Cir. 2002). "[W]e do not hold that the Commonwealth of Kentucky can never display the Ten Commandments or this monument in particular." *Id.* "To the contrary, we believe that the Supreme Court's opinion in *Stone* and Justice Stevens' statements in [*County of Allegheny* not only acknowledge that the Ten Commandments may be constitutionally displayed, they provide considerable guidance [on] how they can be displayed." *Id.* This Court followed the reasoning of *Stone* in *McCreary County*, so the proposition that a Decalogue display can regain constitutional validity remains true. "Thus, even counties such as McCreary and Pulaski, with such an overtly religious purpose in the past, may 'get it right' at some point in the future, based on genuine changes in constitutionally significant conditions." *ACLU of Ky. v. Rowan County*, 513 F. Supp. 2d 889, 897 (E.D. Ky. 2007) (upholding

a Foundations Display erected under circumstances similar to those present here).

Nevertheless, in this case, the Sixth Circuit said that this Court's 2005 finding of an impermissible religious *purpose* for the first and second displays and immediate posting of the Foundations Displays was a finding that the *contents* of the Foundations Displays are unconstitutional. *ACLU v. McCreary County*, 607 F.3d at 449. The panel attempted to qualify its conclusion that "the Supreme Court in *McCreary* has definitively found that the display at issue violates the Establishment Clause, and we are obligated to follow that precedent" by adding, "if no constitutionally significant facts have changed." *Id.* H owever, its footnote chiding the panels that upheld Foundations Displays in Mercer and Grayson counties belies the implication that the panel would uphold the displays if there were changes in "constitutionally significant" facts (whatever that means). *Id.* at 449 n. 5.

> [T]he *Mercer* and *Grayson* opinions essentially ignore the Supreme Court's reliance in *McCreary* on both the content of the display and the evolution of the evidence in determining that Defendants had a religious purpose in posting the Foundations Display. The *Mercer*

> and *Grayson* panels would have us believe that the Supreme Court approved of the content of the Foundations Displays and relied exclusively on the existence of prior displays and past conduct of McCreary County officials in rejecting Defendants' stated purpose as a sham.

Id. at 449 n.5. The Sixth Circuit transformed this Court's reiteration of established precedent –"we do not decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter"–into a meaningless platitude. *See McCreary County*, 545 U.S. at 873-874.

The legal effect of a governmental entity's past alleged unconstitutional conduct is a question of extreme public importance. The Sixth Circuit's opinion conflicts with a prior decision of the same Circuit, the Third and the Seventh Circuits. The opinion holds that the Counties' past conduct concerning the Displays bears directly on the present purpose, and permanently taints any future displays. The opinion conflicts with the Third Circuit's decision in *Schundler*, 168 F.3d at 92 (opinion by Justice, then Judge, Alito, rejecting the ACLU's argument that a prior stand-alone display of a crèche forever tainted a future

display of the crèche containing secular symbols of the holiday), with the Seventh Circuit's decision in *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995) (striking down a Good Friday closing law, Judge Posner reasoned that the State of Illinois could continue with the Good Friday closing by adopting a secular rationale), and with the Sixth Circuit's own opinions in *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999) (rejecting the argument against a Good Friday closing law that a "sign posted for several days in 1996 irrevocably established an endorsement of religion, from which Defendants cannot retreat"), and *Adland*, 307 F.3d at 489 (noting that a religious purpose in a stand-alone Ten Commandments monument did not preclude a future modified display).

This Court should grant certiorari to correct the error and resolve the conflict between the Sixth Circuit's ruling and established precedent.

B. The Sixth Circuit's Ruling Conflicts With This Court's Precedents Which Have Rarely Rejected Government's Stated Secular Purposes.

While this Court found that the Counties' earlier displays evinced an impermissible religious purpose, it also clarified that rejecting the government's stated secular purpose is more the exception than the rule. *McCreary County*, 545 U.S. at 859. "In the past, the [secular purpose] test has not been fatal very often, presumably because government does not generally act unconstitutionally, with the predominant purpose of advancing religion." *Id.* at 863. The Court often accepts governmental statements of purpose, "in keeping with the respect owed in the first instance to such official claims," and it is only in unusual cases when the state's purpose has been found to be an apparent sham or secondary to a predominately religious purpose. *Id.* at 865.

Up to the time of the *McCreary County* decision, this Court had found government action motivated by an illegitimate purpose only four times since *Lemon*. *McCreary County*, 545 U.S. at 865 (citing *Stone, Edwards, Wallace v, Jaffree*, 472 U.S. 38 (1985) and *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290 (2000)). nb In each of those cases, and in *McCreary County*, this Court rejected the government's stated secular purpose only after the Court determined that the challenged statute or display did not advance the stated purposes.

The *Stone* court found that the posting of the Ten Commandments in isolation on classroom walls did not advance the state's proffered educational purpose. *Stone*, 449 U.S. at 42. In *Edwards*, this Court found a statute requiring that Creationism be taught was not designed to meet the stated purpose of protecting academic freedom. *Edwards*, 482 U.S. at 586-587. In *Wallace*, this Court found that revision of a moment of silence statute to add the words "or voluntary prayer" did not further the stated purpose of protecting students' rights to voluntarily pray during the school day because the existing law already provided a one-minute moment of silence. *Wallace*, 472 U.S. at 59-60. In *Santa Fe*, this Court again rejected the school district's proffered secular purposes only after determining that the pre-game invocation policy did not change the prior policy and student vote on prayer. *Santa Fe*, 530 U.S. at 309.

In *McCreary County*, this Court noted that the initial stand-alone displays did not convey a secular message, and that the resolutions approving the second displays contained a religious purpose. 545 U.S. at 869-870. The Court stated that because the third display, the Foundations Display, was mounted without adoption of new resolutions, it did not evince a secular purpose notwithstanding the

stated secular purpose affixed to the wall alongside the Display. *Id.* at 870-871. The Court explicitly left open the possibility that the Counties could establish the necessary connection between the Display and secular purpose. *Id.* at 873-874.

McCreary County did not change the principle that "a finding of impermissible purpose should be rare" and made only after a substantive analysis of the facts before the court. *See Grayson County*, 591 F.3d at 853, *Mercer County*, 432 F.3d at 630 (citing *McCreary County*, 545 U.S. at 862-863). While the Sixth Circuit panels in *Grayson County* and *Mercer County* understood and followed that principle, the panel in this case did not. The panel here did not analyze the Counties' 2007 resolutions. *McCreary County*, 607 F.3d at 448. It merely restated this Court's conclusions about the 2005 purpose statements *i.e.*, that they were adopted merely as litigating positions, and 2005 resolutions, *i.e.*, that they were of minimal significance in light of the evolution of the evidence, and ended its inquiry. *Id.* Moreover, the panel here actually criticized the other panels for undertaking a purpose analysis of the Foundations Display, claiming that such an analysis is no longer appropriate after *McCreary County*. *Id.* at 449. That mischaracterization of this Court's precedent and the resulting intra-circuit conflict on a key

aspect of Establishment Clause analysis should be reviewed and resolved by this Court.

II. THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH OTHER SIXTH CIRCUIT OPINIONS ON IDENTICAL DISPLAYS AS WELL AS OPINIONS IN OTHER CIRCUITS UPHOLDING THE SAME DISPLAY AND OTHER RELIGIOUS DISPLAYS.

The Sixth Circuit panel acknowledged that it created an intra-circuit conflict, but blamed the conflict on the other two panels. *ACLU v. McCreary County*, 607 F.3d 439, 448-449 (6th Cir. 2010).[3] Casting blame on the other panels does not change the fact that this panel, not the other panels, misinterpreted this Court's holding in *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005).

The panel's ruling also conflicts with rulings in the Seventh, Eighth and Ninth Circuits which have upheld the same display and even stand-alone Ten Commandments monuments under the Establishment Clause. These inter-circuit conflicts, combined with the

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[3] All of the cases cited in this argument were decided after this Court's 2005 decision in *McCreary County*.

intra-circuit conflict in the Sixth Circuit evince a need to resolve this conflict.

A. The Sixth Circuit's Panel Decision Conflicts With Other Sixth Circuit Decisions Upholding Identical Foundations Of Law Displays.

The Sixth Circuit panels in *ACLU of Ky. v. Grayson County*, 591 F.3d 837 (6th Cir. 2010) and *ACLU of Ky v. Mercer County*, 432 F.3d 624 (6th Cir. 2005) recognized the narrow holding in *McCreary County* and properly analyzed Foundations Displays identical to the Counties' displays here in light of that narrow holding to find that the displays evinced a secular purpose and that the identical displays also satisfied the effect prong of *Lemon*. *Mercer County*, 432 F.3d at 634; *Grayson County*, 591 F. 3d at 854. Unlike the panel in this case, the *Mercer County* and *Grayson County* panels did not merely restate this Court's statements from *McCreary County* and conclude, without analysis, that there was an impermissible religious purpose. Instead, the *Mercer County* and *Grayson County* panels accorded the proper deference to the governments' stated purposes and analyzed the displays to determine whether they advanced the stated purposes. *Mercer County*, 432 F.3d at 633-634;

Grayson County, 591 F. 3d at 853-854. Having found the necessary nexus, the panels properly found that the Foundations Displays did not violate *Lemon's* purpose prong as modified in *McCreary County*. *Mercer County*, 432 F.3d at 634; *Grayson County*, 591 F. 3d at 854. In both cases, the panels recognized the differential history between their displays and the initial Foundations Displays in *McCreary County*, but also acknowledged and followed this Court's admonition that the history of the *McCreary County* displays did not impose an indelible taint upon all future attempts to post Foundations Displays. *Mercer County*, 432 F.3d at 634; *Grayson County*, 591 F. 3d at 853.

In *Mercer County*, the panel examined the context of the display in light of the county's stated purpose under *McCreary County*'s modified predominant purpose test and found that the predominant purpose of the Foundations Display was secular. *Mercer County*, 432 F.3d at 632. "A reasonable observer would not view this display as an attempt by Mercer County to establish religion. Instead, he would view it for what it is: an acknowledgment of history." *Id.* The court dismissed the proposition that a reasonable observer in Kentucky would be aware of the "tainted legislative history" of the Counties' pre-2005 displays and impute that purpose to the Mercer County display. *Id.* Properly

applying this Court's admonition that the past actions do not forever taint future displays, the *Mercer County* panel found no basis for such an imputation. *Id.* "If the counties involved in *McCreary County* may purge themselves of the impermissible purpose, it follows a fortiori that Mercer County may act free of the McCreary County-taint." *Id.* "Furthermore, the sins of one government should not be revisited on other governments." *Id.*

Similarly, the *Grayson County* panel refused to impute any religious "taint" to a Foundations Display identical to the one in *Mercer County* and the one at issue here. *Grayson County*, 591 F.3d at 849. The panel dismissed minor differences in the procedural history between the displays in Mercer County and in Grayson County as inconsequential to the predominant purpose analysis under *McCreary County*. *Id.* at 854. *McCreary County* did not change the presumption that a government's statement of purpose is to be accorded deference. *Id.* at 853. Nor was it constitutionally significant that a minister requested the county officials at a public meeting to post the same display that was upheld in *Mercer County*. "[C]ourts must proceed with caution in attributing an unconstitutional purpose to a government entity," and a finding of impermissible purpose should be rare. *Id.* The Sixth Circuit panel

found that the Foundations Display sent an "unmistakable message of the County's acknowledgment of legal history." *Id.*

In *ACLU v. Rowan County,* 513 F. Supp. 2d 889, 905 (E.D. Ky. 2007), the court reviewed the Rowan County Foundations Display under this Court's decision in *McCreary County* and the Sixth Circuit's decision in *Mercer County.* It found that while Rowan County's history of having the Ten Commandments displayed in isolation suggested that religion might have been *a* purpose for the Foundations Display, it was not the *predominant* purpose. *Id.* (emphasis in original). Therefore, it did not violate the predominant purpose prong of *Lemon* as articulated in *McCreary County. Id.*

The panel here did not engage in the analysis required to ascertain purpose. *ACLU v. McCreary County,* 607 F.3d at 448. The panel did not address the content of the 2007 resolutions, but merely reiterated what this Court said about the 2005 purpose statements–that they were merely litigating positions–and concluded that the displays were still "tainted." *Id.* Notably, in *McCreary County,* this Court said that had those purposes been presented in a resolution that rescinded prior resolutions–which is what the 2007 resolutions do–then the purpose analysis might have been different. *McCreary County,* 545 U.S. at 871-872. The

panel's failure to properly apply *McCreary County* places it at odds with the other Sixth Circuit panels, with *McCreary County*, and with decisions in other circuits. The resulting conflict leaves lower courts and legislators guessing about how to post historical expressions of religion without violating the Establishment Clause. This Court should resolve the conflict and release courts and legislators from Establishment Clause "purgatory." *Mercer County*, 432 F.3d at 636.

B. The Sixth Circuit's Opinion Conflicts With Opinions From The Seventh, Eighth And Ninth Circuits Upholding Public Displays of the Ten Commandments.

The Sixth Circuit's determination that the Counties' Foundations Displays remain "tainted" with a predominantly religious purpose also conflicts with decisions in other circuits upholding Foundations Displays and even stand-alone displays of the Ten Commandments.

The Seventh Circuit found that the identical Foundations Display at issue here satisfied *Lemon*'s purpose prong. *Books v. County of Elkhart*, 401 F.3d 857, 866 (7th Cir. 2005). As this Court did in *McCreary County*,

Stone, Edwards, Wallace, and *Santa Fe*, and the Sixth Circuit did in *Mercer County* and *Grayson County*, the Seventh Circuit emphasized the importance of reviewing both the content and context of a display and the government's stated purposes. *Id.* at 865. As the Sixth Circuit found in *Mercer County* and *Grayson County*, the Seventh Circuit concluded that the identical Foundations Display, "taken as a whole, does not belie the County's asserted secular purpose of exhibiting important historical documents to contribute to the education and moral character of its citizens by instilling a sense of history, civic duty, and responsibility." *Id.* at 866. When the government has adopted a resolution setting forth historical, educational or cultural reasons for a display and the display as a whole reflects those values, then it is reasonable to find that there is a secular purpose. *Id.*

The Eighth and Ninth circuits have found secular purposes underlying stand-alone Ten Commandments monuments, which further illustrates the conflict created by the Sixth Circuit's finding that an integrated display evinces a predominantly religious purpose. *ACLU Nebraska Foundation v. City of Plattsmouth*. 419 F.3d 772 (8th Cir. 2005) (en banc); *Card v. City of Everett*, 520 F.3d 1009 (9th Cir. 2008). In *Plattsmouth*, the en banc court reversed the panel's decision that the

granite stand-alone monument had an impermissible religious purpose under *Lemon*. *Plattsmouth*, 419 F.3d at 775. The en banc court relied upon *Van Orden v. Perry*, 545 U.S. 677 (2005) to reverse the panel's decision, but found that the conclusion would be same under *Lemon*, based upon the reasons set forth by the dissent in the panel opinion. *Id.* at 778 n.8 (citing *ACLU Nebraska Foundation v. City of Plattsmouth,* 358 F.3d 1020, 1043-50 (8th Cir. 2004) (Bowman, J. dissenting)). In that dissenting opinion adopted by the en banc court, Judge Bowman rejected the panel's finding that an impermissible religious purpose was imputed to the city because of the perceived religious purpose of the monument's donors decades before and the fact that the display consisted of the Ten Commandments. *Plattsmouth,* 358 F. 3d at 1044. As the en banc court implicitly recognized, such an imputed religious purpose is not acceptable even after *McCreary County*. *See Plattsmouth* (en banc), 419 F.3d at 778 n.8.

Similarly, the Ninth Circuit refused to impute a religious purpose from the past unto a present display when it upheld a stand-alone monument in *Card*, 520 F.3d at 1020. The Ninth Circuit applied *Van Orden,* but like the en banc court in *Plattsmouth,* implicitly recognized that this Court's statement that religious purpose in an initial display does not

"forever taint" future displays means that a court should not reach back in time and graft a past religious purpose onto a present display. *See McCreary County*, 545 U.S. at 873-874.

The Sixth Circuit's determination that an impermissible religious purpose continues to permeate the Counties' Foundations Displays creates a conflict that leaves lower courts and legislators standing on shaky ground when trying to create or analyze constitutionally valid public displays that incorporate historic expressions of religion. This Court should accept review to resolve the conflict.

III. THE CONFLICT CAUSED BY THE SIXTH CIRCUIT'S OPINION DEMONSTRATES THE URGENT NEED TO REPLACE *LEMON* WITH AN OBJECTIVE, WELL-DEFINED STANDARD FOR ESTABLISHMENT CLAUSE ANALYSIS OF PASSIVE RELIGIOUS DISPLAYS.

The turmoil caused by the Sixth Circuit's decision is symptomatic of the pervasive conflict and confusion spawned by the inconsistently applied and ill-defined test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The intra-circuit and inter-circuit conflicts created by the Sixth Circuit's ruling here illustrate what Justice Thomas called the "incoherence of

the Court's decisions in this area." *See Van Orden v Perry,* 545 U.S. 677, 694 (2005) (Thomas, J. concurring in judgment). Courts and legislators continue to wrestle with whether *Lemon* will be applied to public displays, if *Lemon* is not used, then which test will be used, or if *Lemon* is used, then how its factors will be defined. The Sixth Circuit's decision here only creates further confusion by adding more walls to the Establishment Clause maze. But, the problem with Lemon originates with this Court, and this Court should accept this case for review and resolve the problem.

The decision in *McCreary County* presents a classic example of the confusion this Court has caused by relying upon *Lemon.* Argued and decided on the same day, this Court in a 5-4 decision used *Lemon* to strike down an historical display that contained the Ten Commandments, but in a 4-1-4 plurality decision upheld a stand-alone Ten Commandments monument without ever citing *Lemon. Compare McCreary County*, 545 U.S. at 870-871 with *Van Orden*, 545 U.S. at 677.

Justice Scalia observed that "[a]s bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve." *McCreary County*, 545 U.S. at 900 (Scalia, J.

dissenting). That the Sixth Circuit panel here could manipulate the *Lemon* test to reach a conclusion on the same Foundations Display that conflicts with two other panels of the same Circuit illustrates the havoc caused by *Lemon*. "Our jurisprudential confusion has led to results that can only be described as silly." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 45 n. 1 (2004) (Thomas, J. concurring). "Silly" is one way to describe the incongruous results between the panel decision here, the decisions in *Mercer County* and *Grayson County*, the Seventh Circuit opinion in *Books*, and the numerous district court opinions reaching inconsistent results regarding identical Foundations Displays. *See e.g., Rowan County*, 513 F.Supp. 2d at 905 (upholding Foundations Display); *ACLU v. Garrard County* 517 F. Supp. 2d 925 (ED Ky 2007) (finding disputed facts regarding the purpose and effect of the Foundations Display); *ACLU v. Rutherford County*, 2006 WL 2645198 (M.D. Tenn. 2006) (denying a permanent injunction against the Foundations Display).

The *Lemon* test should be abandoned and this Court's Establishment Clause jurisprudence transformed from a labyrinth into an objective, constitutionally appropriate test that provides lower courts and legislators with proper guidance.

A. *Lemon* Is Not Consistently Used And There Are No Guidelines To Determine When It Should Be Used.

This Court need look no further than its opinion in *Van Orden* to witness the inconsistent application of the *Lemon* test that has contributed to the "hopeless disarray" and "jurisprudential confusion" of this Court's Establishment Clause cases. *Newdow*, 542 U.S. at 45 n. 1 (Thomas, J. concurring). Having just resurrected and revamped the *Lemon* test in *McCreary County*, the Court ignored the test on the same day in *Van Orden*, 545 U.S. at 687. "Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history." *Id.* The Court did not explain how the six-foot tall granite monument on the grounds of the Texas State Capitol was more of a "passive" monument than was the Decalogue posted by the Counties as one of eleven equally sized frames, nor why the Texas monument was an acceptable illustration of "the rich American

tradition of religious acknowledgments" but the Counties' displays were not. *Id.* at 690.

In 2005, this Court used *Lemon* in only one of the three Establishment Clause cases.[4] Since then, this Court has not squarely addressed an Establishment Clause challenge, and therefore has not relied upon *Lemon.* This leaves lower courts and legislators in the dark about whether *Lemon* has been implicitly abandoned. This Court should accept review to illuminate lower courts and legislators and declare that *Lemon* is no longer the standard for analyzing Establishment Clause challenges.

The confusion created by the contemporaneous conflicting decisions in *McCreary County* and *Van Orden* and subsequent silence regarding *Lemon* was cogently described by the Ninth Circuit in *Card*, 520 F. 3d at 1016:

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[4] The Court did not use *Lemon* in 2005 when it upheld the Religious Land Use and Institutionalized Persons Act in a decision handed down on May 31, 2005. *Cutter v. Wilkenson*, 544 U.S. 709 (2005). Then, on June 27, 2005, this Court used *Lemon* in *McCreary County*, but did not use *Lemon* in *Van Orden*. *McCreary County*, 545 U.S. at 844; *Van Orden*, 545, U.S. at 677.

> Our study of the cases leads us to two conclusions. First, that the three-part test set forth in *Lemon* and modified in *Agostini* remains the general rule for evaluating whether an Establishment Clause violation exists. Second, that we do not use the *Lemon* test to determine the constitutionality of some longstanding plainly religious displays that convey a historical or secular message in a non-religious context. Because the Supreme Court issued *McCreary*, broadly espousing *Lemon*, contemporaneously with *Van Orden*, narrowly eschewing *Lemon*, we must read the latter as carving out an exception for certain Ten Commandments displays. We cannot say how narrow or broad the 'exception' ma y ultimately be; not all Ten Commandments displays will fit within the exception articulated by Justice Breyer.

That proved true one year later when the Tenth Circuit did not apply *Van Orden* to a concrete Ten Commandments display, but invalidated it under *Lemon*. *Green v. Haskell County Bd of Comm'rs,* 568 F.3d 784, (10th Cir. 2009), *reh'g*

en banc denied, 574 F.3d 1235 (10th Cir. 2009). The Eighth Circuit, like the Ninth, has used *Van Orden* to uphold concrete Decalogue monuments. *Plattsmouth*, 419 F.3d at 776-777. *See also, Twombly v. City of Fargo*, 388 F.Supp. 2d 983, 986-990 (D. ND 2005) (applying *Van Orden* to validate a concrete Ten Commandments monument).

The application of *Lemon* to the display in *McCreary County* and immediate exemption from *Lemon* in *Van Orden* is merely the latest example of the inconsistent application and tenuous viability of *Lemon* as a standard for Establishment Clause analysis in this context. Twelve years before *McCreary County* and *Van Orden*, Justice Scalia said:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman*, 505 U.S. 577, 586-587,

> 112 S.Ct. 2649, 2654, 120 L.Ed.2d 467 (1992), conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it.

Lamb's Chapel v. Central Moriches Union Free School Dist., 508 U.S. 384, 398 (1993) (Scalia, J. concurring in the judgment).

> The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it, *see, e.g., Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985) (striking down state remedial education program administered in part in parochial schools); when we wish to uphold a practice it forbids, we ignore it entirely, *see Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983) (upholding state legislative chaplains). Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts," *Hunt v. McNair*, 413 U.S. 734, 741, 93 S.Ct. 2868, 2873,

> 37 L.Ed.2d 923 (1973). Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

Id. at 399. *Lemon* largely remained dormant between *Lamb's Chapel* (1993) and *McCreary County* (2005) as this Court failed to apply it in several Establishment Clause cases, including *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995), *Agostini v. Felton*, 521 U.S. 203 (1997), and, only a few weeks before *McCreary County* in *Cutter*, 544 U.S. 709.

In *McCreary County* the Court not only woke the sleeping monster, but also re-energized its purpose prong, turning what was a limited, deferential inquiry into "a rigorous review of the full record" to search for a predominantly religious purpose. *McCreary County*, 545 U.S. at 902 (Scalia, J. dissenting). It then promptly anesthetized it the same day in *Van Orden*, 545 U.S. at 687. However, since *Van Orden* only anesthetized *Lemon*, it continues to haunt judicial chambers, inserting itself willy-nilly into opinions, keeping lower courts and legislators guessing as to when it might appear again to pronounce judgment on public displays of religious expression. Since the decisions do not offer definitive standards for when *Lemon* should be applied, no one

knows when their display might be subject to its haunting. While such mystery might make for good late-night television, it makes for a hopelessly incoherent and unintelligible constitutional standard. *See Van Orden*, 545 U.S. at 694, 697 (Thomas, J. concurring in judgment). And while this Court is free to take *Lemon* out of the tomb and put it back at will, lower courts are not so free. They are left to struggle with the monster. Even worse, government officials not trained in the law are hopelessly confused.

B. *Lemon*'s Problems Are Exacerbated By The Absence Of Clear Definitions Of The Component Factors.

Justice Scalia's observation that "[a]s bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve," illustrates why, even when it appears that *Lemon* is the appropriate standard, the analysis is still hopelessly confusing. *McCreary County*, 545 U.S. at 901 (Scalia, J. dissenting). The test went from the initial three-part test of purpose, effect and entanglement to a two-part test of purpose and effect, which then became endorsement, *Lynch v. Donnelly*, 465 U.S. 668, 691-692 (1984) (O'Connor, J. concurring), to a

two-part test of predominant purpose and endorsement in *McCreary County*. None of those iterations, however, has offered clear definitions of the underlying factors. Governments are vulnerable to the subjective leanings of lower courts unfettered by the bounds of objective definition. As Justice Thomas observed: "The unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections." *Van Orden,* 545 U.S. at 697 (Thomas, J. concurring in judgment). "The outcome of constitutional cases ought to rest on firmer grounds than the personal preferences of judges." *Id.* Examination of this Court's precedents reveals the truth of Justice Thomas' assessment.

1. The ill-defined purpose prong has been made worse by McCreary County's modification.

McCreary County's reformulation of the purpose prong into the predominant purpose test has added another layer of uncertainty to what was already an uncertain standard. "By shifting the focus of *Lemon*'s purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose, the [*McCreary County*] Court converts what has in the past been a fairly

limited inquiry into a rigorous review of the full record." *McCreary County*, 545 U.S. at 902-903 (Scalia, J., dissenting). That shift in focus has only exacerbated the problems inherent in *Lemon*. Courts now must review the context and history of each challenged action to determine whether that particular act is "predominantly religious" without knowing what constitutes a "predominantly religious purpose." *See id.* Not surprisingly, this has led to inconsistent results that have only made Establishment Clause jurisprudence more confusing than ever.

The Ninth Circuit's analysis of the words "under God" in the Pledge of Allegiance illustrates the confusion caused by the heightened but still undefined purpose analysis. *Newdow v. Rio Linda School Dist.*, 597 F.3d 1007, 1021 (9th Cir. 2010). The Ninth Circuit reviewed the rulings in *McCreary County* and *Van Orden* and tried to reconcile the inconsistencies in its conclusion about "Under God" in the pledge. The court reasoned that the word "Lord" in the Counties' initial Ten Commandments display was improper because it was surrounded only by other words with an "unstinting focus" on religion, but the same word "Lord" in the Ten Commandments was acceptable in *Van Orden* because it was surrounded by other monuments and historical objects. *Id.* "Likewise, the phrase 'one Nation

under God' in the Pledge appears as part of a pledge of allegiance to 'the Flag of the United States of America, and to the Republic for which it stands,' not a personal pledge of allegiance to God," and therefore was acceptable under the reasoning of *Van Orden*. *Id.* at 1022-1023.

One Tenth Circuit panel found that the pictograph of three crosses, including one cross that was larger than the others, did not evince a "predominant religious purpose" under *McCreary County* because it related to the name of the city, Las Cruces, meaning, the crosses, which in turn, was reflective of secular historical events. *Weinbaum v. City of Las Cruces*, 541 F. 3d 1017, 1033-1034 (10th Cir. 2008). However, another panel said that a granite Ten Commandments monument substantially similar to the monument upheld in *Van Orden* did exhibit a "predominantly religious purpose" under *McCreary County*. *Green*, 568 F.3d at 801.

The Sixth Circuit's decision here also elucidates the problem. The panel acknowledged that the prior impermissible purpose could be changed by "constitutionally significant" circumstances. Without defining "constitutionally significant" circumstances, the panel said that changes in personnel, passage of time with no posted display and new

resolutions renouncing all prior purposes did not fit the definition. *ACLU v. McCreary County*, 607 F.3d 439, 448 (6th Cir. 2010). The Counties are left with having to discern what the panel thinks would constitute "constitutionally significant" circumstances sufficient to evince a permissible secular purpose. This epitomizes Justice Scalia's observation in *McCreary County*:

> What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle. That is what prevents judges from ruling now this way, now that–thumbs up or thumbs down—as their personal preferences dictate. Today's opinion forthrightly (or actually, somewhat less than forthrightly) admits that it does not rest upon consistently applied principle.

McCreary County, 545 U.S. at 890-891 (Scalia, J., dissenting). The same is true of the Sixth Circuit's decision, which demonstrates why this Court should accept certiorari and overrule *Lemon*.

2. The "objective observer" standard is not consistently defined even among members of this Court.

Defining the "objective observer" has proven even more problematic than has defining purpose. The statement that "[t]he eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act," *id.* at 862, has spawned conflicts even among the members of this Court in the same case.

In *County of Allegheny,* Justice O'Connor said the reasonable observer would appreciate a display featuring a menorah and Christmas tree as an effort to acknowledge cultural diversity and tolerance of religious belief or non-belief. *County of Allegheny v. ACLU,* 492 U.S. 573, 635-636 (1989) (O'Connor, J. concurring). Justice Brennan said the reasonable observer could not overlook the "religious significance" of a Christmas tree placed next to a menorah. *Id.* at 641 (Brennan, J., concurring in part and dissenting in part).

In *Lynch*, Justice O'Connor found that a reasonable observer would not view the city's

Christmas display that included a crèche, Santa Claus house, reindeer, candy-striped poles, a Christmas tree and carolers as endorsing religion. *Lynch,* 465 U.S. at 692 (O'Connor, J., concurring). Justices Brennan, Marshall, Blackmun and Stevens disagreed: "For many, the City's decision to include the crèche as part of its extensive and costly efforts to celebrate Christmas can only mean that the prestige of the government has been conferred on the beliefs associated with the crèche, thereby providing 'a significant symbolic benefit to religion....' *Id.* at 701 (Brennan, J. dissenting).

Justice Scalia observed that the "objective observer" test has created "invited chaos" as Justices have adopted varying definitions for the observer, or "hypothetical beholder." *Pinette*, 515 U.S. at 768 n.3. There is "any beholder (no matter how unknowledgeable)," "the average beholder," and "the 'ultra-reasonable' beholder." *Id.* "And, of course, even when one achieves agreement upon that question, it will be unrealistic to expect different judges (or should it be juries?) to reach consistent answers as to what any beholder, the average beholder, or the ultra-reasonable beholder (as the case may be) would think. It is irresponsible to make the Nation's legislators walk this minefield." *Id.*

The Sixth Circuit's decision has made the minefield more treacherous. Legislators not only have to ascertain which definition of observer is appropriate, but also the extent of his memory and what actions are sufficient to neutralize any prior religious recollections. A wrong step on any of these issues triggers litigation. This Court should accept review and provide legislators with a safe path in the form of an objective and easily understood standard for analyzing Establishment Clause challenges to public displays of religious expression.

CONCLUSION

The panel's decision conflicts with *McCreary County* and other precedents from this Court, with decisions from other panels in the Sixth Circuit and with decisions in the Seventh, Eighth and Ninth Circuits. The decision exemplifies the pervasive conflict caused by continued reliance upon the *Lemon* test, particularly since its modification by this Court in *McCreary County*. For these reasons, this Court should grant certiorari and overturn the Sixth Circuit's decision.

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Respectfully Submitted,

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